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239-609—66

# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 619

JOHN ANDREADIS (OR JOHN ANDRE) AND DRUG RESEARCH CORPORATION, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 366 F. 2d 423.

### JURISDICTION

The judgment of the court of appeals was entered on September 1, 1966. The petition for a writ of certiorari was filed on October 1, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether, in a prosecution for using the mails and television to defraud (18 U.S.C. 1341–1343), the jury must be instructed that it is necessary to prove

that persons intended to be defrauded were actually deceived.

2. Whether certain evidence, designed to show petitioners' knowledge that their representations concerning their product were false, was properly admitted.

3. Whether conduct of the prosecutor was improper, and if so, whether it requires reversal in the absence of a showing of prejudice.

4. Whether the verdict was supported by the evidence as to (a) fraudulent advertising claims, (b) existence of a conspiracy to defraud, and (c) misbranding.

## STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Eastern District of New York on thirty counts of a fifty-eight count indictment charging (1) mail fraud in violation of 18 U.S.C. 1341 and 1342 (counts 1–6, 8–13, and 14–18), (2) wire fraud in violation of 18 U.S.C. 1343 and 1342 (counts 19–45), (3) conspiracy to commit the mail and wire fraud offenses in violation of 18 U.S.C. 371 (count 46) and (4) misbranding in violation of 21 U.S.C. 352(f)(1) (count 57). On June 25, 1965, petitioner Andreadis was sentenced to eighteen months in prison on each count, the sentences to run concurrently, and was fined $1,000 on each of the sixteen mail fraud and twenty-seven wire fraud counts, $3,000 on the conspiracy count, and $4,000 on the misbranding count—a total of $50,000 in fines. Petitioner Drug Research Corporation was fined $1,000 on each of the same mail and wire fraud counts, $5,000 on the conspiracy count, and $5,000 on the mis-

branding count, a total of $53,000.[1] The court of appeals affirmed.

The mail and wire fraud counts of the indictment charged that petitioners devised and participated in a scheme to defraud by means of false representations in mailed and televised advertising which held out "Regimen Tablets" as a clinically proven "No-Diet" method of weight reducing by means of drugs designed to suppress the appetite, remove excess fluid, and produce a feeling of satisfaction (Pet. 6–7). The misbranding counts accused petitioners of incorporating the same false representations on the box labels and in the circulars and displays accompanying cartons of "Regimen Tablets" (Pet. 9–10).

The evidence showed that from 1955 through 1962 "Regimen Tablets" were sold as a non-prescription "miracle" weight reducing drug (R. 658).[2] Petitioner Andreadis was the president of petitioner Drug Research Corporation and the person whose approval was needed before advertising could be run (R. 3042). Andreadis retained Kastor, Hilton, Chesley, Clifford and Atherton, Inc. (hereafter Kastor-Hilton), as his advertising agency from 1957 through 1961 (R. 658). At his direction, Kastor-Hilton undertook a nation-

[1] Co-defendant Kastor, Hilton, Chesley, Clifford and Atherton, Inc., was also convicted on substantive counts 1–6, 8–11, 15–17, 19–45, and on the conspiracy count it paid a $50,000 fine. Co-defendant New Drug Institute, Inc., pleaded guilty to counts 1, 19, 47, and 49. The cases against co-defendants Herrick and Miklean were dismissed. The trial court granted a motion of acquittal as to all defendants on counts 7 and 14, and no verdict was rendered on counts 47–56 and count 58.

[2] The record on file with the Clerk of this Court is in 12 volumes, consecutively paginated. Pages 4760–5283 are missing.

wide advertising campaign that cost Drug Research between 7 and 10 million dollars and resulted in gross sales of 12 to 15 million dollars through 1961 (R. 657, 2810, 3181).

The basic theme of all "Regimen Tablet" advertisements from 1957 through 1962 consisted of two ideas: that Regimen was a new wonder drug which would enable the user to lose weight without dieting; and that it had been medically tested and clinically proved (R. 3041).

The advertising campaign included the hiring of "endorsers," persons who appeared periodically on television programs and stated that, while taking "Regimen Tablets," they were losing weight without dieting. Dorothy Bryce testified of being hired as an endorser by Andreadis who asked her, "If I hire you how do I know you will lose weight?" He told her that "no drug was a miracle" and that she would have to diet (R. 710, 930). Her contract provided inducements for her to lose weight, and, by a side agreement, she received a $50 bonus for every pound over fifteen that she lost (R. 930–932, 2362, 1396–1397, 3129–3130, 2716). Under the supervision of Kastor-Hilton (R. 2266–2269, Exh. 90), in six weeks she lost twenty-five pounds on a starvation diet (R. 803–804, 936, 950). She also used a drug called Diruil, suggested by petitioners' physician, to lose body fluids (R. 792–793). While on the diet she made regular television appearances during which she stated she was losing weight without dieting (R. 774, 952–959). Similar testimony was elicited from other hired endorsers.

Petitioners' advertising copy regularly included assertions that the "new wonder drug" had been subjected to clinical tests (referred to as "clinicals"). Petitioners purported to engage physicians to test the drug's efficacy and to substantiate their advertising claims (R. 3341, 3342, 3373), in order to obtain acceptance of the claims by advertising media (R. 3341–3344). However, Dr. Grollman, appearing as an expert for the government, testified that he had reviewed the alleged clinical tests and concluded that they were meaningless and did not establish the efficacy of "Regimen Tablets" (R. 4464–4478). He and Dr. Mayer, another expert, were in complete agreement that "Regimen Tablets" were totally ineffective as an aid in losing weight (R. 350, 4441-4443) and that their opinions reflected the views of the scientific literature and community (R. 4460, 355–357, 406). Both testified that the Fazekes test, a well-controlled scientific experiment which had been performed on "PPA," the primary ingredient in "Regimen," had established that, even at double the dosage level in "Regimen," the drug was ineffective in curbing appetite, and that its effect was essentially identical to that of a placebo used in the test (R. 584–601, 4478–4480).

Complaints and criticisms about petitioners' advertising claims for "Regimen Tablets" (including the so-called "clinicals") were expressed, beginning around 1957, by the Food and Drug Administration, the Kansas State Board of Health (R. 4650), the National Better Business Bureau, the American Medical Association, and the New York Academy of

Medicine (R. 4659 *et seq.*). The agency and these organizations asserted that the claims regarding loss of weight without dieting were unsubstantiated and that the clinical tests were worthless. These views were communicated to petitioners by Kenneth Wilson, President of the National Better Business Bureau (R. 4675 *et seq.*),[3] by the Kansas State Board of Health (R. 4655), by officials of "Life" magazine (R. 3820), the National Broadcasting Company (R. 3332), and other publishers and broadcasters (R. 3195, 3198). Executives of Kastor-Hilton discussed news of the Fazekes test and the numerous criticisms with petitioner Andreadis (*e.g.*, R. 3195, 3202, 3272–3283); believing the product could not be sold without the representations (R. 3051, 3195), Andreadis rejected the complaints and ordered Kastor-Hilton to continue the campaign unchanged (*e.g.*, R. 3284–3285a).

In 1964, petitioners pleaded guilty to a State charge of falsely advertising "Regimen Tablets" as a no-diet clinically-proven reducing drug (R. 4840–4842). In admitting evidence of these pleas, the court instructed the jury that the State statute required no proof of intent to falsify or defraud (R. 4845).

After trial, the court heard evidence (R. 5492 *et seq.*) on petitioners' complaint that the prosecutor, Martin Pollner, had improperly collaborated with

[3] Mr. Wilson showed petitioner Andreadis a letter from Dr. Brown, one of the physicians hired by petitioners to perform clinical evaluations of "Regimen," in which Brown stated that no scientific conclusions could be drawn from his clinicals and that he did not believe they established that "Regimen" was a "no-diet" reducing drug (R. 4706–4709, Exh. 172). Petitioners continued to use the clinicals (R. 3341–3363).

writer Peter Wyden in the latter's researching of a highly derogatory chapter on "Regimen" for his book "Overweight Society" published on March 22, 1965, during the trial (R. 5529). The chapter was later condensed and published on May 1, 1965, in "T.V. Guide" magazine (R. 5606). During the trial the court twice asked the jurors if they had read either publication and received negative responses (R. 5308, 5495–5497). And throughout the trial, the court repeatedly admonished the jurors that they must not read any publicity about the case (R. 6–7, 642, 815, 2721, 3109, 3290, 3442).

The evidence at the hearing showed that Peter Wyden approached Mr. Pollner after having read the extensive National Better Business Bureau file and the transcript of a Congressional hearing, both regarding "Regimen," and after having conferred with Food and Drug Administration officials and with the prosecutor in the prior State case (R. 5559, 5560, 5584, 5592). He had learned that Mr. Pollner had in his office a set of the depositions given in 1964 in a civil case brought against "Regimen" by the Food and Drug Administration. These depositions were part of the public record on file in the United States District Court (R. 5548–5550). Although Mr. Pollner allowed Wyden to read the depositions in his office on several occasions, he volunteered no information (R. 5561–5562, 5540, 5548). Wyden characterized Pollner's attitude as one of apprehension, saying "* * * [H]e did everything but throw me out of the office" (R. 5578–5579). Pollner expressed concern that the book (and later the article) would be pub-

lished before the trial ended (R. 5514), and sought to delay both so that neither would interfere with the trial (R. 5579, 5588). The court found that nothing in the conduct of Mr. Pollner had affected the trial, and that the jurors had read neither the book nor the article (R. 5639).

## ARGUMENT

1. The evidence was clear and uncontradicted that petitioners' advertised product was incapable of doing what petitioners said it could do: cause loss of weight without dieting. Nevertheless, petitioners contend (Pet. 22–32) that the mail and wire fraud convictions should have been reversed because the indictment did not allege, and the judge did not instruct the jury that it must find, that someone was in fact defrauded.[4] Petitioners recognize that it has long been the established rule in mail and wire fraud cases that the government need not prove that the fraudulent scheme was actually successful in defrauding anyone. *Pereira* v. *United States*, 347 U.S. 1; *Adjmi* v. *United States*, 346 F. 2d 654 (C.A. 5), certiorari denied, 382 U.S. 823; *United States* v. *Rowe*, 56 F. 2d 747 (C.A. 2), certiorari denied, 286 U.S. 554. Petitioners read *United States* v. *Baren*, 305 F. 2d 527 (C.A. 2) and *United States* v. *Rabinowitz*, 327 F. 2d 62 (C.A. 6), as changing this settled principle. The court below, which decided the *Baren* case, viewed it as confined to

[4] There was in fact evidence that persons were defrauded. At trial the government produced purchasers who testified that "Regimen" failed to help them lose weight, that some had actually gained weight, that when a refund was made it was less than the amount due, and that some got no money back (R. 4875–4922).

the situation where the product was in fact capable of doing what its promoters said it could do, the fraud arising out of sales misrepresentations unrelated to the quality of the product itself. See 366 F. 2d at 431. For the same reason, the *Rabinowitz* case is also inapposite. The court stated in *Rabinowitz* that "the 'inherent utility' of the [product] * * * removes this case from the ordinary run of mail fraud prosecutions." 327 F. 2d at 66. Thus, neither case supports petitioners, whose product was a fake,[5] and neither purports to change the established rule that the government need not offer proof that persons whom a defendant intended to defraud were actually deceived.

2. Petitioners decry the admission of evidence regarding complaints made by the National Better Business Bureau and others to petitioners about the falsity of their advertising claims of no-diet reducing and clinical tests (Pet. 36–39). The court admitted the evidence with repeated instructions (*e.g.* R. 4669–4670 and 3279) that it was received only upon the issue of whether the defendants had knowledge that their claims as to the efficacy of "Regimen Tablets" were false—essential to the issue of intent to defraud—and not for the truth of the matter asserted in

[5] The court below pointed out, 366 F. 2d at 431, that when the product was capable of performing as advertised, it may be advisable—in order to protect innocent sellers—to require proof that purchasers were in some way deceived. We think such protection is adequately afforded by the requirement of proof of intent to defraud—precisely the element on which the *Rabinowitz* case was decided, petitioners' assertions to the contrary notwithstanding. See 327 F. 2d at 80–81. The *Baren* and *Rabinowitz* cases involved, incidentally, the sale of similar products, namely knitting machines.

the complaints. The court further instructed the jury that the truth or falsity of petitioners' promotional claims for "Regimen Tablets" would have to be established by independent evidence and not by the complaints. The admission of such evidence with the limiting instructions was proper. *United States* v. *Press*, 336 F. 2d 1003 (C.A. 2), certiorari denied, 379 U.S. 965.

3. The inquiry into the conduct of the prosecutor in relation to the publication of Peter Wyden's book and magazine article demonstrated that petitioners' complaint was baseless (see Pet. 40–44). The prosecutor did not engage in "collaboration with the author" (Pet. 40) nor participate "in a sensationalized attack on Regimen tablets" (Pet. 3); indeed, he attempted to discourage and delay publication until after the trial. The court of appeals found nothing improper in his conduct (366 F. 2d at 432).

Moreover, the court throughout the trial repeatedly admonished the jurors not to read any publicity about the case, and on two separate occasions each juror denied that he had read the publications. Petitioners do not claim that the jurors were untruthful.

4. Petitioners' complaints as to the sufficiency of the evidence are also without merit.

*a.* Petitioners' reliance (Pet. 32–36) upon *Reilly* v. *Pinkus*, 338 U.S. 269, is misplaced, because the evidence of Doctors Grollman and Mayer, which petitioners say was insufficient on the issue of intent to defraud, was in fact admitted to show that petitioners' representations about their product were scien-

tifically false. *Reilly* merely implies that, if something less than universality of scientific belief is shown, an intent to deceive might not be inferrable. Here, however, there was ample additional and independent evidence of petitioners' intent. In addition, the court's instructions regarding these expert witnesses, to which petitioners raised no objection, were proper.

*b.* There was ample evidence to support the conspiracy charge (compare Pet. 45–46). The evidence showed agreements between petitioners and their advertising agency, among other things, to submit advertising to media knowing the copy to be false, to submit false clinical test reports to media, to put endorsers on television knowing they were not telling the truth, to falsify the entire endorser program, and to ignore the criticism and objections leveled at their advertisements. The court of appeals properly characterized petitioners' bald claim of the "manifest deficiencies of the trial proofs" (Pet. 46) on the conspiracy charge as "without a shred of evidentiary support," "conclusory," and "wholly without merit" (366 F. 2d at 434).

*c.* Petitioners conclude from the fact that the jury rendered a verdict on only one of the twelve misbranding counts that the jury was confused, that the verdict was a compromise, and that the evidence was insufficient to support the charge. (Pet. 47–50). Even assuming the verdict was logically inconsistent, that is not a ground for reversal. *Dunn* v. *United States*, 284 U.S. 390.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

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